(4)

No. 06-535

FILED
JAN 29 2007

In The
Supreme Court of the United States

RODNEY HANS HOLM,

Petitioner,

V.

STATE OF UTAH,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Utah

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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I. *REYNOLDS V. UNITED STATES* IS A SIGNIFICANT OBSTACLE TO JUDICIAL RECOGNITION OF THE LEGAL CLAIMS AND CIVIL RIGHTS OF RELIGIOUS POLYGAMISTS.

The State argues that *Reynolds v. United States*, 98 U.S. 145 (1879), had no influence or effect on the due process portion of the majority opinion, and that any suggestion to the contrary is merely "off-handed" speculation by Justice Nehring in his concurring opinion. *See* Brief in Opposition, at 9-11.

As Petitioner has noted, *see* Petition, at 9, *Reynolds* is properly cited for the proposition that the Free Exercise Clause does not exempt religious believers from complying with neutral and generally applicable laws. *Reynolds* retains a much broader influence in the lower courts, however, being commonly cited as support for the off-handed and summary rejection of constitutional and other legal claims brought by religious polygamists. *See, e.g.*, *Shahar v. Bowers*, 114 F.3d 1097, 1100 (11th Cir. 1997) (rejecting claim of state attorney who was terminated for participating in same-sex religious commitment ceremony because, *inter alia*, "the Supreme Court repeatedly held that the Constitution provides no protection to polygamous marriages") (citing *Reynolds*); *White v. Utah*, No. 01-4225, 41 Fed. Appx. 325, 326-27, 2002 WL 1038767 (10th Cir. May 23, 2002) (summarily rejecting challenge to Utah bigamy statute because the challenge "is foreclosed by Supreme Court and Tenth Circuit precedent") (citing *Reynolds*); *Barlow v Evans*, 993 F. Supp. 1390, 1393 (D. Utah 1997) (rejecting claim of discrimination brought under the Fair Housing Act by religious polygamists because the practice of polygamy "is unquestionably unlawful") (referring to *Reynolds*); *see also Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973) ("Statutes making bigamy a crime surely cut into an individual's freedom to associate, but few today seriously claim such statutes violate the First Amendment or any other constitutional

provision."). *Reynolds* remains the lens through which the general constitutionality of polygamy is viewed, and its endorsement of the constitutionality of laws which target religious polygamy biases all constitutional and legal analysis.

This is particularly the case in Utah. Justice Nehring, who was an undoubted participant in all of the Utah Supreme Court's internal deliberations about this case, only gave voice to the obvious when he observed that the "cultural and political volatility" of polygamy in Utah creates a special risk that judicial decision making in this area is influenced by extra-legal considerations. *See State v. Holm*, 2006 UT 31 ¶ 111, 137 P.3d 726 (Nehring, J., concurring). Petitioner submits that the very fact that Justice Nehring felt it necessary to write his concurring opinion suggests that *Reynolds* played a significant role in the Utah Supreme Court's deliberations.

The importance of *Reynolds* to this issue cannot be overstated. The State asserts that prosecutions are "rare" and therefore not of sufficient importance to merit constitutional review. By citing only reported decisions in support of this assertion, however, the State masks the extent to which *Reynolds* influences the law and law enforcement decisions. For example, in cases which are not reported in the appellate reports, men have been prosecuted for religiously-motivated bigamy when doing so provided an advantage in child custody or marriage dissolution proceedings. *E.g.*, *State v. Bronson*, Case No. 991700034, Fourth Judicial District Court, Millard County, Utah (guilty plea to a bigamy charge held in abeyance if defendant lives exclusively with his lawful wife); *State v. Easterday*, 991600165, Sixth Judicial District Court, Sevier County, Utah (defendant charged with bigamy based upon videotape of a deposition in his divorce case in which he admitted to marrying a second woman).

Yet the true impact of *Reynolds* is not even fully felt in the criminal courts so much as in the daily lives of religious polygamists. For example, members of the community police force in Colorado City, Arizona and Hildale, Utah were decertified because the officers practiced adult polygamy. *See* Michael N. Westley, *Two Polygamous Police Officers Stripped of Utah Certifications*, SALT LAKE TRIB., March 24, 2005, at B2. A Hildale justice court judge was removed from office because he practiced polygamy with three adult women. *In re Steed*, 2006 UT 10, 131 P.3d 231. A bill was recently introduced in the Arizona House of Representatives which provides that "the court shall not grant a person sole or joint physical or legal custody of a child or unsupervised parenting time with a child" if the person has engaged in polygamy. Ariz. HB2325, 48th Legis., 1st sess. *Cf. Shepp v. Shepp*, 588 Pa. 691, 906 A.2d 1165 (2006) (reversing as unconstitutional a lower court's order prohibiting Fundamentalist Mormon from teaching his children about polygamy). Additional examples are described at pages 7-8 of the Petition.

The continued citation of *Reynolds* as supporting the constitutional viability of bigamy statutes in Utah and other States tacitly endorses, and thus exacerbates, the social and legal stigma that attaches to religious polygamists. These are the concerns that Justice Nehring gave voice to in his concurring opinion in this case, and these are the same concerns that prompted review, and ultimately invalidation, of the Texas sodomy law in *Lawrence v. Texas*. *See* 539 U.S. 558, 575 (2003) (concluding that "[w]hen homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination in both the public and the private spheres," and concluding further that continuing to uphold such a law "demeans the lives of homosexual persons").

The bigamy statute relegates religious polygamists to the status of second-class citizens. The State's contention that the constitutional rights of religiously motivated polygamists do not merit review because the issue is confined to a few residents in Utah and Arizona is not only factually incorrect, as Mr. Holm documented in his Petition, but also exemplifies the trivialization of polygamists' civil rights that Petitioner seeks to remedy by asking this Court to review the constitutionality of the bigamy statute.

II. PETITIONER HAS STANDING TO CHALLENGE THE UTAH BIGAMY STATUTE BECAUSE MS. STUBBS WAS NOT A MINOR AT ALL TIMES RELEVANT TO THE CONVICTION, AND BECAUSE THE AGE OF THE PARTNER TO A PURPORTEDLY BIGAMOUS RELATIONSHIP IS NOT AN ELEMENT OF THE CRIME.

The State argues that Petitioner lacks standing to challenge the constitutionality of the Utah bigamy statute because his partner in the purported bigamous marriage, Ms. Stubbs, was a minor at the time she entered the relationship; and because the State characterizes Petitioner's challenge as a facial one. Although standing may be raised for the first time on appeal, it is nevertheless significant that the State has not previously challenged Petitioner's standing.[1]

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[1] No member of the Utah Supreme Court considered Ms. Stubbs' age a barrier to reaching the merits of Petitioner's arguments. *See Holm*, 2006 UT 31, at ¶¶ 49-87 (majority opinion) (addressing the merits of Petitioner's arguments under the Free Exercise and Speech Clauses of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment); *id.*, at ¶ 134 (Durham, C.J., concurring in part and dissenting in part).

> Because I do not agree that the state can constitutionally criminalize private religiously motivated consensual relationships between adults, I believe Holm's conviction under [the Utah bigamy stat-

The Utah bigamy statute provides, "A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person." UTAH CODE ANN. § 76-7-101. One can violate the statute by purporting to marry, or by cohabiting. In separate verdicts, Petitioner was specifically convicted of both bigamous cohabitation with Ms. Stubbs, and purporting to marry her.

The cohabitation occurred both while Ms. Stubbs was a minor, and after she became an adult. Ms. Stubbs was born July 21, 1982. (Tr. 428.) According to the Information, "Between December 11, 1998 and December 9, 2001, in Washington County, State of Utah, the defendant, Rodney Hans Holm, knowing he had a wife, purported to marry another person or cohabited with another person, R. Stubbs." Based on those facts, it is incorrect to conclude that Ms. Stubbs was a minor at all times relevant to the bigamy conviction. Petitioner's conviction for bigamous cohabitation is thus based at least in part on conduct with an adult.[2]

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ute]—which does not rely on the fact that Holm's partner in his alleged bigamy was a minor—must be overturned . . . .

Id.; *see also id.*, at ¶ 63 (majority opinion) (rejecting Petitioner's argument under the Due Process Clause of the Fourteenth Amendment because of a purported distinction between "private intimate sexual conduct between consenting adults" and "polygamists' attempts to extralegally redefine the acceptable parameters of a fundamental social institution like marriage").

[2] Moreover, under Utah law, when Petitioner and Ms. Stubbs purported to marry each other, she was capable of consenting to licensed marriage because she was 16. The only interest the State retains in the marriage of a 16- or 17-year-old is its interest in ascertaining that the consent of at least one parent was obtained. UTAH CODE ANN. § 30-1-9. In this case, Ms. Stubbs' father, who is not a member of Petitioner's church, testified that he had consented to the relationship. (Tr. 446-50; 505, 507, 584-87, 589-90.)

Ms. Stubbs' age was not an element of the crime and was thus irrelevant to Petitioner's conviction under both the "purport" and "cohabit" prongs of the statute. No age element has ever been required by the Utah courts for conviction under the statute, nor have such courts otherwise narrowed the statutory language so that it criminalizes only bigamous conduct with minors.[3] The Utah Attorney General is without authority unilaterally to narrow the statutory language in that manner, and his asserted policy of initiating prosecutions under the bigamy statute only in cases involving under-aged participants is not a law or regulation that binds even him.

The State advances as a "standing" argument what is really an argument on the merits of one of the ultimate issues raised by the Petition. Standing exists because the bigamy statute describes Petitioner's conduct, and he has a right to seek a ruling on the elements of the crime for which he was actually convicted. Were this Court to accept Petitioner's constitutional challenge and strike down the Utah statute, his conviction would not survive even though Ms. Stubbs was a minor, because the age of the bigamous partner is not an element of the crime. Indeed, to hold otherwise would involve a wholesale and inappropriate federal rewriting of the State's statute.

The State has also mischaracterized the Petition as a strictly facial challenge to the Utah bigamy statute. Petitioner is mounting both facial and as-applied challenges to the unique "cohabitation" prong of the statute, which is not present in the bigamy laws of any other State. With regard to the "purport" prong, Petitioner concedes the State's right to prohibit "simple bigamy" where the defendant has misrepresented his marital status to his bigamous partner or a deceit has otherwise occurred. Thus, Petitioner is not challenging the constitutionality of the

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[3] In fact, under the Utah Criminal Code child bigamy is defined as a separate crime. UTAH CODE ANN. § 76-7-101.5.

"purport" prong in all or virtually all of its applications, but rather only as applied to persons in his and Ms. Stubbs' situation—that is, persons who know that their partner is legally married to someone else, who have not obtained a legal license to marry or otherwise availed themselves of the State apparatus for entering into legal marriage, who do not believe that they themselves are legally married, and who do not hold themselves out as legally married.

Petitioner has standing to bring this challenge. To demonstrate standing to bring suit, a plaintiff must demonstrate that (i) the plaintiff has actually suffered a concrete and particularized injury, rather than a merely hypothetical one, (ii) the plaintiff's injury is causally related to the challenged conduct of the defendant before the court, and (iii) it is likely rather than merely speculative that a favorable judicial decision will redress the plaintiff's injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

Petitioner's constitutional due process challenge to the Utah bigamy statute meets those requirements. First, Petitioner suffered an actual and not merely a hypothetical injury under the Utah bigamy statute, because he was convicted and imprisoned for violating it. Second, Petitioner's injury is traceable to conduct of the State of Utah, which enacted and enforces the Utah bigamy statute whose constitutionality he challenges in his Petition. Finally, a favorable decision by this Court on Petitioner's constitutional challenge will result in reversal of his conviction under the statute.

III. THE UTAH BIGAMY STATUTE PURSUES ITS LEGITIMATE MARRIAGE PROTECTION INTEREST ONLY AGAINST RELIGIOUS POLYGAMISTS.

The State incorrectly argues that resolution of the confusion in the lower courts over the meaning of general ap-

plicability is a matter of mere error correction. See Brief in Opposition, at 18-21.

This Court held in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), that a law's failure to exempt religious conduct from its reach is subject to strict scrutiny under the Free Exercise Clause of the First Amendment if the law is not religiously neutral and generally applicable. *Id.* at 531-32. Since *Lukumi* was handed down, the circuits and other lower courts have divided over whether the requirement of general applicability merely restates the requirement of religious neutrality, or is instead an independent test of constitutionality. *See* Petition, at 23 nn. 9-10.

This is not a matter of mere error correction, as the State would have it, but a question whose resolution would clarify the reach of Free Exercise protections. Moreover, resolution of this question is of interest not only to the State of Utah—whose inhabitants are, in any event, entitled to the protections of the First and Fourteenth Amendments—but would affect the application of the Free Exercise Clause in every State in the Union.

The instant case presents this precise question. The Utah Supreme Court emphasizes that the Utah bigamy statute is religiously neutral, and that it plays an important role in defending the State's undoubted interest in protecting the institution of marriage as it has been traditionally defined and understood. *See State v. Holm*, 2006 Utah 31, at ¶¶ 51, 56-60. The Utah Supreme Court, however, failed to explain why it is permissible for the State to pursue its interest in protecting the traditional definition of marriage only against religious polygamists, while leaving untouched large categories of social behavior which threaten that interest to an equal or greater extent. *Compare id.*, at ¶¶ 169 & n.22, 170 (Durham, C.J., concurring in part and dissenting in part) (observing that the State does not prosecute adultery, fornication, or other "nonreligiously motivated cohabitation," even where "one

of the parties to the cohabitation is married to someone else").

The State's reliance on *State v. Geer*, 765 P.2d 1 (Utah Ct. App. 1988), is misplaced. *Geer* reviewed a prosecution for simple bigamy in which the defendant had participated in two licensed civil marriage ceremonies and had misrepresented his marital status to the partner of the bigamous relationship. By contrast, the relevant conduct here is a sexual relationship between informed and consenting adults whose legal recognition by the State is neither represented nor sought. Accordingly, *Geer* provides no support for the State's contention that it applies the Utah bigamy statute and other Utah marriage-protection laws evenhandedly against all conduct that threatens the traditional definition of marriage.

This Court should clarify that, notwithstanding the facial religious neutrality of the Utah bigamy statute, it is not generally applicable because it pursues legitimate State interests only against religious practitioners.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court issue a writ of certiorari to the Utah Supreme Court to consider the questions raised in his petition.

Respectfully submitted,

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January 29, 2007